Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	
	)	CG Docket No. 02-278
Petition for Rulemaking and Declaratory Ruling Filed by Craig Moskowitz and Craig Cunningham	)	

COMMENTS OF THE AMERICAN BANKERS ASSOCIATION

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EXECUTIVE SUMMARY

The American Bankers Association[1] (ABA) writes in opposition to the Petition for Rulemaking and Declaratory Ruling filed by Craig Cunningham and Craig Moskowitz (Petitioners).[2]

Efficient, effective communications are essential if financial institutions are to serve their customers and comply with their regulatory obligations. Suspicious activity alerts, notices of address discrepancies, data security breach notifications, delinquency notifications, loan modification outreach, and other time-critical, non-telemarketing communications must reach large numbers of customers promptly. Only automated calling – not manual dialing by live agents – can meet these requirements for most bank customers in a timely and efficient manner.

For 25 years, financial institutions and their customers have relied on the interpretation by the Federal Communications Commission (FCC or Commission) of requirements under the Telephone Consumer Protection Act (TCPA or Act)[3] for customers to consent to receive autodialed or prerecorded, non-telemarketing calls (informational calls) to a wireless number. The Commission's interpretation of the statutory phrase "prior express consent" reflects a common sense understanding that when a customer voluntarily provides a phone number as part

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[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits and extend more than $9 trillion in loans.

[2] Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (filed Jan. 22, 2017), *available at* https://ecfsapi.fcc.gov/file/1012266041876/Petition%20for%20Rulemaking%20with%20Appendices%20A%20and%20B%20-%20FINAL.pdf.

[3] 47 U.S.C. § 227 et seq.

of an application or in response to an oral request by a financial institution, that customer has consented to be called at that number.

Petitioners seek to upend this interpretation. They propose to replace the Commission's interpretation of "prior express consent" with a requirement that, prior to making informational calls to a wireless number, the caller must have the customer's prior express *written* consent, which specifically reflects the customer's agreement to receive autodialed and/or prerecorded voice informational calls at the wireless number provided. Petitioners would also extend this written consent requirement to informational calls made to *residential* lines—calls for which the Commission currently requires no consent.

If adopted, Petitioners' proposal would impose an unnecessary barrier to valued communications between a bank and its customer. Many consumers may overlook, neglect, misread, or otherwise not focus on a request to provide written consent to receive "autodialed and pre-recorded calls" without thinking about the informational calls and alerts they receive from their bank. In addition, consumers would be prohibited, under the petition, from orally consenting to receive informational calls. Instead, they would be forced to provide their consent through alternative means, a procedural chore that many simply would not attend to, which would mean that they will not receive important and time-sensitive messages. Because of these risks, the Commission rejected a similar requirement in 2012.

The Commission's interpretation of prior express consent also reflects a permissible exercise of its rulemaking authority consistent with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[4] In passing the TCPA, Congress was silent about the precise requirements

[4] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

of prior express consent. Instead, Congress delegated to the Commission the authority to promulgate regulations interpreting the Act, granted the Commission "flexibility" to design rules appropriate for different types of calls, and directed the Commission not to impose restrictions that would be a "barrier to the normal, expected or desired communications between businesses and their customers."[5] The Commission's interpretation accords with Congress' directives by facilitating those communications. By contrast, Petitioners' proposal would impair them, contravening Congress' intent.

The Commission should also reject Petitioners' proposed interpretation because a written consent requirement will stifle economic activity and is inconsistent with President Donald Trump's executive orders designed to promote economic growth and reduce regulatory burden. In re-assessing its interpretations of the TCPA, the Commission should make it easier—not more difficult—for consumers to receive important information from their financial institutions and other companies with which they do business.

DISCUSSION

I. THE COMMISSION'S INTERPRETATION IS PERMISSIBLE UNDER *CHEVRON*

The Supreme Court's seminal decision in *Chevron* is clear: if a statute is "silent or ambiguous" about the "precise question at issue," then "considerable weight" should be accorded to an agency's construction of a statutory scheme it is entrusted to administer.[6] Those circumstances are present here. The TCPA is silent on the requirements of "prior express

[5] H.R. Rep. No. 102-317, at 17 (1991).
[6] *Chevron*, 467 U.S. at 842-44.

consent," the Commission has been entrusted to administer the TCPA, and any reviewing court would conclude that the Commission's interpretation is permissible.

A. The TCPA Is Silent on the Requirements of "Prior Express Consent"

Congress was silent on the "precise question" of what prior express consent requires; it did not define the term in the TCPA. If Congress intended to impose specific requirements for prior express consent, it would have written those requirements into the statute.[7]

Instead, Congress directed the Commission to "prescribe regulations" to implement the Act's requirements[8] and granted the Commission "the *flexibility* to design different rules" for different types of automated or prerecorded calls.[9] Under *Chevron*, because Congress has "left a gap for the agency to fill" in construing "prior express consent," Congress has provided an "express delegation of authority" to the Commission to provide the meaning of that statutory term.[10]

Even Petitioners concede that Congress has not spoken on this question, acknowledging that, "[t]o be sure, the Commission . . . may have discretion under *Chevron* to define how prior express consent may be given . . . ."[11] Petitioners cannot maintain, on the one hand, that Congress has clearly spoken on the meaning of "prior express consent," and then state, on the other hand, that the Commission retains discretion to define how such consent may be given.

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[7] *See, e.g.*, *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 176-77 (1994) (applying principle that, if Congress intended to impose certain requirements in statute, it would have used specific words in statutory text).
[8] 47 U.S.C. § 227(b)(2).
[9] Telephone Consumer Protection Act of 1991 § 2(13), Pub. L. No. 102-243, 105 Stat. 2394 (emphasis added).
[10] *Chevron*, 467 U.S. at 843-44.
[11] Pet. at 21.

B. The Commission's Existing Interpretation of "Prior Express Consent" Accords with a Common Sense Understanding of How a Person Provides Consent and Is Supported by the TCPA's Legislative History

Where Congress did not define a statutory term, the agency's interpretation need only be "permissible" to withstand judicial scrutiny.[12] Here, the Commission's construction of "prior express consent" is more than permissible; it reflects the common sense understanding that a consumer who voluntarily provides his or her phone number to a business expects to be called by that business at that number.

Moreover, the Commission's construction of "prior express consent" is supported by the TCPA's legislative history. The report of the House Committee on Energy and Commerce accompanying enactment of the TCPA (House Report) specifically contemplated that "prior express consent" would be interpreted to include circumstances where the consumer has provided his or her telephone number to a business. The House Report stated:

> The restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications. *The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers.* For example, a retailer, insurer, banker or other creditor would not be prohibited from using an automatic dialer recorded message player to advise a customer (at the telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or performed, or a bill had not been paid.[13]

The report of the Senate Committee on Commerce, Science, and Transportation (Senate Report) is consistent with the House Report. The Senate Report states that the TCPA "will allow automated calls to be sent as long as the called party gives his or her prior express consent either orally or in writing."[14]

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[12] *Chevron*, 467 U.S. at 843.
[13] H.R. Rep. No. 102-317, at 17 (emphasis added).
[14] S. Rep. No. 102-178, at 4 (1991).

The legislative history of the TCPA also shows Congress was aware that it needed to specify that consent be in writing if Congress had intended to impose that requirement. As introduced in the Senate, the TCPA would have required "the prior, express, *written* consent of the called party" for calls made to residential numbers.[15] That requirement was removed prior to the Act's passage.[16] Thus, Congress considered requiring written consent for certain calls, but subsequently removed that requirement, choosing to give the Commission flexibility to regulate such calls. Consequently, Petitioners have no basis to assert that the statutory text compels the Commission to impose a written consent requirement for automated informational calls when Congress knew how to impose such a requirement had it wished to do so.[17]

A written consent requirement for non-telemarketing calls is also inconsistent with Congress' goals for imposing restrictions on automated calls to wireless numbers. These restrictions were written, not only to protect privacy, but to control the shifting of costs to consumers at a time when wireless service was expensive, relatively rare, and almost never used by consumers as their primary means of telephone communication.

The Commission's common sense interpretation of "prior express consent" reasonably balances the consumer cost and privacy interests Congress sought to promote.[18] A customer who provides a wireless number already has weighed the costs, in privacy and calling charges, of

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[15] Telephone Consumer Protection Act of 1991, S. 1462, 102d Cong. § 2(a) (1991) (as introduced) (emphasis added).
[16] S. Rep. No. 102-178, at 4 & 5.
[17] *Cf. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 220 (1983) (holding that it is "improper for [a court] to give a reading to the Act that Congress considered and rejected").
[18] *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9) (finding that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced . . . .").

receiving calls from the business at that number, and has decided to incur those costs as the price of receiving the corresponding benefit. A business that acts in accordance with this decision is not intruding unexpectedly on the consumer's privacy or imposing unexpected calling costs. Accordingly, as the Commission correctly decided, the intent of the statute is satisfied by the customer's act of providing a wireless contact number to the caller.

II. THE PETITION DOES NOT WARRANT CONSIDERATION BY THE COMMISSION

A. The Petition Requests a Rulemaking that Would Be Redundant of Prior Rulemakings

The petition does not warrant consideration by the Commission, because it requests a rulemaking that would be redundant of prior rulemakings. As far back as 1992—and as recently as 2012—the Commission has sought comment and issued rulings on the precise questions raised by Petitioners: (a) whether a person who has provided his or her phone number has given "prior express consent" to be called at that number, and (b) whether the Commission should adopt a written consent requirement for automated calls made to a cell phone or residential line. On numerous occasions, the Commission has considered and declined to adopt the policy proposed by Petitioners. The Petition is repetitive of those rulemakings and can be denied on that basis alone.[19]

In its first rulemaking under the TCPA, in 1992, the Commission requested comment on how it should implement the Act's requirements.[20] After considering the extensive record, the

[19] *See* 47 C.F.R. § 1.401(e) (granting Commission authority to deny petitions that are "moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission").

[20] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 7 FCC Rcd 2736 (1992).

Commission concluded that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."[21] The Commission affirmed that conclusion in a declaratory ruling in 2008.[22] In 2010, the Commission proposed revisions to its rules under the TCPA for *telemarketing* calls for the purpose of harmonizing those rules with the Federal Trade Commission's Telemarketing Sales Rule.[23] In the 2010 proposal, the Commission sought comment on "whether it should adopt the same requirement" for consent to make autodialed informational calls to cell phones.[24] But in the final rule, issued in 2012, the Commission concluded that "requiring prior express written consent for all [autodialed or prerecorded informational] calls would unnecessarily restrict consumer access to information communicated through purely informational calls."[25]

Petitioners had an opportunity to participate in those rulemakings; there is no indication from their Petition or from the records in those proceedings that they did so. Moreover, Petitioners point to no change in circumstances that would warrant reconsideration of these prior rulemakings. In short, Petitioners supply no reason for the Commission to retread this ground.

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[21] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8769 ¶ 31 (1992) (hereinafter, *1992 TCPA Order*).
[22] *Rules and Regulations Implementing the Telephone Consumer Protection Act*, 23 FCC Rcd 559, 559 ¶ 1 (2008) (hereinafter, *ACA Declaratory Ruling*).
[23] Proposed Rule, Telephone Consumer Protection Act of 1991, 75 Fed. Reg. 13,471, 13,471 (Mar. 22, 2010).
[24] *Id.* at 13,474.
[25] Final Rule, Telephone Consumer Protection Act of 1991, 77 Fed. Reg. 34,233, 34,235 (June 11, 2012).

B. Financial Institutions Have Relied on the Commission's Long-Standing Interpretation of "Prior Express Consent"

The Commission's long-standing interpretation of "prior express consent" has engendered expansive and substantial reliance by financial institutions and others who make non-telemarketing, informational calls. When an agency's policy has "engendered serious reliance interests," the agency must provide a "detailed justification" for the change of policy.[26] Petitioners have provided no justification for the Commission to adopt a policy reversal that serves no public interest and would impose significant costs.

A wide range of businesses and organizations representing many segments of the U.S. economy and government have relied on the Commission's existing interpretation of "prior express consent." When the Commission sought comment on the proposal issued in 2010 to require written consent for all autodialed calls, at least 50 parties—representing Federal government agencies, banks and other financial institutions, educational institutions, communications service providers, retailers, and polling and research organizations—commented in opposition to the proposal, citing, among other arguments, their substantial reliance on existing TCPA rules.[27]

To comply with the prior express consent requirement, financial institutions have relied on the Commission's consistent findings that (1) prior express consent to receive an autodialed

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[26] *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also Smiley v. Citibank* (S.D.), N.A, 517 U.S. 735, 742 (1996) (holding that "change [in agency policy] that does not take account of legitimate reliance on prior interpretation . . . may be arbitrary, capricious or an abuse of discretion") (internal citation, alteration, and quotation marks omitted).

[27] *See* Reply Comments of the Financial Services Roundtable, the American Bankers Association, and the Consumer Bankers Association, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, at 13-18 (filed June 21, 2010) (listing parties that opposed proposal to require written consent for all autodialed calls).

or prerecorded voice call at a mobile number may be given orally or in writing, and (2) a business may contact a customer at a mobile telephone number provided to that business by the customer.[28] Accordingly, some financial institutions have created and use application forms that ask customers to designate the numbers at which they wish to be contacted. Some financial institutions also use calling scripts in their telephone conversations with prospective and existing customers that are written to request and obtain contact numbers, including mobile numbers, at which the institutions may contact those customers.

These compliance efforts have resulted in an "installed base" of millions of customer consents obtained in accordance with this Commission's guidance over more than two decades of TCPA implementation orders. In many instances, these consents would no longer constitute consent if the Commission altered its long-standing interpretation of prior express consent as Petitioners requested. Member institutions provided ABA with the following data on the impact Petitioners' proposal would have on their ability to make automated informational calls:

- One bank would be prevented from placing 48 million automated voice calls per month under Petitioners' proposal.
- A second bank would not have been able to make 21.7 million automated calls or text messages in 2016.
- A third bank would be rendered unable to call approximately 90% of the bank's mortgage portfolio if needed to advise a borrower of an account's overdue status.
- A fourth bank, which relies on customers' consents obtained when the customer provides his or her number during the application process, stated that it "would have to basically start over in order to receive consent if this petition is successful."

[28] *See 1992 TCPA Order*, 7 FCC Rcd at 8769 ¶ 31; *ACA Declaratory Ruling*, 23 FCC Rcd at 559 ¶ 1.

In sum, banks would no longer be able to rely on a substantial number of consents provided by their customers, and nearly all banks would need to make significant changes to their processes for obtaining consent, if the Commission altered its interpretation of prior express consent. Petitioners have provided no justification for the dramatic change they propose to an interpretation on which banks and their customers have substantially relied for over two decades.

III. A WRITTEN CONSENT REQUIREMENT WOULD CURTAIL IMPORTANT COMMUNICATIONS TO CONSUMERS FROM THEIR BANKS AND OTHER BUSINESSES

Of all the institutions with which people must stay connected, their banks are among the most vital. As described in our comments to the 2010 proposal[29] and reproduced in an appendix to this letter, banks send automated informational messages to prevent fraud and identity theft, provide notice of security breaches, provide low-balance and over-limit alerts, and help consumers avoid delinquency, among other reasons. Autodialers enable large numbers of consumers to receive these important communications quickly.[30] But these communications will be curtailed, if not eliminated, if banks cannot make them efficiently, harming the very consumers the TCPA is intended to protect.

[29] Comments of the Financial Services Roundtable, the American Bankers Association, and the Consumer Bankers Association, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, at 5-10 (filed May 21, 2010).

[30] Alerting consumers by text message is far superior than using e-mail. Research shows that 98% of text messages are opened, and 90% are read within 3 minutes of delivery. Aine Doherty, *SMS Versus Email Marketing*, BUSINESS 2 COMMUNITY (July 28, 2014), http://www.business2community.com/digital-marketing/sms-versus-email-marketing-0957139#!bth7SG#QDcqk57uy2b5oYLA.97; Cheryl Conner, *Fifty Essential Mobile Marketing Facts*, FORBES (Nov. 12, 2013, 11:40 PM), http://www.forbes.com/sites/cherylsnappconner/2013/11/12/fifty-essential-mobile-marketing-facts. Only 22% of e-mailed messages are read. Doherty, *supra*.

Under the written consent requirement proposed by Petitioners, financial institutions will be faced with difficult compliance choices, all of which will have adverse consequences for customers. If Petitioners' proposal is applied retroactively to the consents already obtained, banks must either forego important and valued communications with existing customers whose consents might not pass muster under the new requirements, incur extraordinary expense to call those existing customers manually, or undertake a time-consuming, costly, and less effective effort to re-contact existing customers and replace consents already obtained with new consents. Past experience suggests that efforts to re-establish the customer's consent would achieve only meager success. Customers who *thought* they had consented to receive alerts and other communications will not, in fact, receive those messages.

If the requirement is applied prospectively, the more burdensome consent requirements Petitioners propose will complicate, and therefore increase the cost of, valued customer service calls and alerts, limiting their availability. Under a written consent requirement, consumers would no longer be able to provide consent in the course of a phone call with their financial institution. Institutions generally obtain customer contact information when an account relationship is initiated, which can occur in person, over the phone, or over the internet. In the case of an account opened by phone, the customer would not be able to consent to receive calls during the transaction and instead would be burdened with an additional form to complete and send to the bank.

Existing customers would also be prevented from updating their contact information via a phone call to customer service. Instead, customers would be required to go online or obtain and return the institution's written consent form in order to change their contact number. Either step will discourage many consumers from consenting despite the value of the communications.

A written consent requirement would also harm those consumers who lack appreciation of the range of valuable customer services provided by autodialed informational calls from their financial institutions. Consumers often lack time to consider fully the benefits provided by these calls. Moreover, many consumers falsely interpret a request to consent to receive "autodialed and/or artificial voice/prerecorded" informational calls as a request to consent to receive telemarketing calls.

Ultimately, a written consent requirement would harm consumers by intruding upon the customary and natural interaction between a bank and its customer, make it more difficult for consumers to consent to receive important information from their financial institutions, and potentially leave the consumer confused and frustrated. When Congress enacted the TCPA restrictions on non-telemarketing calls to wireless numbers, Congress sought to provide consumers with *choice* of contact, not isolation from contact. A written consent requirement for autodialed informational calls would make that choice for users more burdensome, less efficient, and more costly. That is not what Congress sought to accomplish, and it is not an appropriate path for the Commission to follow. The Commission should reject Petitioners' ill-advised proposal.

IV. THE COMMISSION SHOULD NOT IMPOSE RULES UNDER THE TCPA THAT IMPAIR ECONOMIC GROWTH

A top priority of President Trump is to promote economic growth, as recently issued executive orders make clear.[31] If the Commission imposes a written consent requirement, as

[31] *See* Exec. Order 13,771 (imposing requirements on executive departments and agencies to reduce regulation and control regulatory costs); Exec. Order 13,777 (imposing requirements to enforce President's regulatory reform agenda); Exec. Order 13,772 (listing the President's core principles for regulating the U.S. financial system).

proposed by Petitioners, businesses will incur higher costs, limiting economic growth and impeding the efficiency that fuels economic growth.

As discussed above, regulatory compliance obligations and customer needs will continue to require financial institutions to alert customers to potentially suspicious transactions, resolve address discrepancies, alert customers to data security breaches, request missing information on account applications, and attempt to avoid late fees, adverse credit references, and foreclosures by calling customers who are overdue on payments. Imposing a written consent requirement for automated informational calls to a wireless number is unlikely to prevent many of those communications from being made, but it will increase substantially the cost of the many calls, and some calls might not be made in time to benefit the customer. One ABA member bank, which makes 1.75 million mortgage servicing calls each month, reported that its employees will need to devote nearly *nine* times as many hours to make these legally-mandated servicing calls under the proposed written consent requirement.

By increasing costs to businesses to make these important calls, Petitioners' proposed changes to the existing prior express consent requirements are at odds with President Trump's efforts to reduce regulatory burden and to encourage economic growth. Moreover, if the Commission implements a new regulation to implement Petitioners' proposed changes, the Commission would also face the task to "identify at least two existing regulations to be repealed" the savings of which would offset fully the cost of the new regulation.[32]

[32] Exec. Order 13,771 § 2(a) & (c).

CONCLUSION

Automated, non-telemarketing calls provide significant benefit to consumers by advising them of data breaches, suspicious activity on the account, low account balance, or loss mitigation outreach. Petitioners seek to upend the Commission's settled interpretation of how consumers may provide consent to receive these calls, impose significant burden on consumers and their financial institutions, and initiate a rulemaking that would be redundant of prior rulemakings that have addressed the precise questions posed by Petitioners.

The relief sought by Petitioners—the imposition of a written consent requirement for essentially *all* informational calls, to cell phone *and* residential numbers—would contravene Congress's clear intent, reverse 25 years of the Commission's interpretations of the TCPA, and run counter to the federal government's policy priority to promote economic growth. Petitioners provide no justification to make such a dramatic and harmful change. The Commission should reject Petitioners' request.

Respectfully Submitted,

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APPENDIX

Several examples of the benefits that banks' non-telemarketing communications provide to consumers are summarized below.

I. Breach Notification and Fraud Alerts

With identity theft and fraud losses at all-time highs,[33] financial institutions are relentlessly pursuing fraud detection and prevention capabilities. A key component is autodialed calling to consumers' wireline and mobile telephones, including text messaging to customers' mobile devices, to alert customers to out-of-pattern account activity and threatened security breaches. In addition, financial institutions are required to establish response and consumer notification programs following any unauthorized access to consumers' personal information, under Section 501(b) of the Gramm-Leach-Bliley Act, as well as under the breach notification laws of 46 states and the District of Columbia.[34] The required notifications, which average 300,000 to 400,000 messages per month for one large financial institution alone, cannot be disseminated in the timely manner such circumstances demand unless the process is automated.[35]

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[33] In 2015, 781 data breaches were reported, a 27 percent increase from 2013. Press Release, Identity Theft Resource Center, Identity Theft Resource Center Breach Report Hits Near Record High in 2015 (Jan. 25, 2016), *available at* http://www.idtheftcenter.org/index.php/ITRC-Surveys-Studies/2015databreaches.html. Over 13 million people were victims of fraud that year. AL PASCUAL, KYLE MARCHINI, & SARAH MILLER, JAVELIN STRATEGY & RESEARCH, 2016 IDENTITY FRAUD: FRAUD HITS AN INFLECTION POINT (Feb. 2, 2016), *available at* https://www.javelinstrategy.com/coverage-area/2016-identity-fraud-fraud-hits-inflection-point.

[34] Gramm-Leach-Bliley Financial Services Modernization Act of 1999, Pub. L. 106-102, 113 Stat. 1338, § 501(b); *see, e.g.*, Cal. Civ. Code § 1798.29; Fla. Stat. § 817.5681; 815 ILCS § 530/10(a); NY CLS Gen. Bus. § 899-aa; N.C. Gen. Stat. § 75-65; Rev. Code Wash. § 19.255.010.

[35] The greater efficiency of automated calling is suggested by a report issued by Quantria Strategies, LLC, which states that automated dialing permits an average of 21,387 calls per employee per month, as opposed to an average of 5,604 calls per employee per month when manual dialing is used. The gain in efficiency when automated methods are used is 281.6%. *See* J. Xanthopoulos, *Modifying the TCPA to Improve Services to Student Loan Borrowers and*

In addition, identity theft victims have the right, under the Fair Credit Reporting Act (FCRA), to have fraud alerts placed on their credit reporting agency files, which notify all prospective users of a consumer report that the consumer does not authorize the establishment of any new credit plan or extension of credit without verification of the consumer's identity. Further, the FCRA expressly directs financial institutions to call consumers to conduct this verification.[36]

II. Consumer Protection and Fee Avoidance Calls

Banks use autodialed telephone communications to protect consumers' credit and help them avoid fees. Banks seek to alert consumers about low account balances, overdrafts, over-limit transactions, or past due accounts in time for those customers to take action and avoid late fees, accrual of additional interest, or negative reports to credit bureaus. Indeed, the FDIC listed "low-balance alerts" as one of the "most promising strategies" for financial institutions to help consumers avoid overdraft or insufficient funds (NSF) fees.[37] Banks also to seek to notify customers that a payment is received, a bill is ready for the customer's review, or that the

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Enhance Performance of Federal Loan Portfolios 9 (July 2013), *available at* https://ecfsapi.fcc.gov/file/7521097219.pdf.

[36] Fair Credit Reporting Act § 605A (codified at 15 U.S.C. § 1681c-1).

Although the Commission granted ABA's request for an exemption from the TCPA's consent requirements for data breach and suspicious activity alert calls, the Commission required that exempted calls be made *only* to a number that was *provided* by the customer. As a result of this requirement, many consumers will not be contacted with time-sensitive messages intended to prevent fraud and identity theft simply because there is no documentation that the consumer, not a spouse or other joint account holder, provided the number to the financial institution. One ABA member bank is unable to send approximately 3,000 exempted messages *each day* due to the provided number condition. A second ABA member bank is not able to send an exempted message to 62% of its customers because of the condition. Consequently, financial institutions must continue to make data breach and suspicious activity alert calls by relying on the called party's prior express consent.

[37] FED. DEPOSIT INS. CORP., FIL-32-2016, REQUEST FOR COMMENTS ON MOBILE FINANCIAL SERVICES STRATEGIES AND PARTICIPATION IN ECONOMIC INCLUSION DEMONSTRATIONS 3 (2016), *available at* https://www.fdic.gov/news/news/financial/2016/fil16032.pdf.

customer's dispute has been received or resolved. Autodialed calls that deliver prerecorded messages are the quickest and most effective way for these courtesy calls to be made. Failure to communicate promptly with consumers who have missed payments or are in financial hardship can have severe, long-term adverse consequences. These consumers are more likely to face late fees, repossession, foreclosure, adverse credit reports, and referrals of their accounts to collection agencies. Prompt communication is a vital step to avoid these harmful consumer outcomes.

III. Loan Modification Calls

Banks also rely upon automated calling methods to contact consumers who are encountering difficulty paying their mortgages, student loans, or other debt owed to the institution. Autodialers and prerecorded messages are used to initiate contact with distressed borrowers, to remind them to return the paperwork needed to qualify for a modification, and to notify borrowers that a modification is being delivered so that the package will be accepted. A financial institution's communications to the distressed borrower may forestall the institution's need to take subsequent legal action to collect on the debt or enforce its security agreement.

The existing consent requirement already imposes a barrier for servicers, which, under the Bureau's mortgage servicing rules, must make a good faith effort to establish live contact with a borrower. If the servicer has not obtained the consent of the borrower, it cannot—consistent with the TCPA—efficiently make the calls required by the Bureau's rules to the approximately 50% of consumers with wireless numbers only.[38] A written consent requirement would make it even more difficult for servicers to obtain consent to make these required calls.

[38] *See* STEPHEN J. BLUMBERG & JULIAN V. LUKE, U.S. DEP'T OF HEALTH & HUMAN SERVICES, CTR. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR HEALTH STATISTICS, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW

IV. Customer Service Calls

Banks rely upon the efficiency of autodialed calling to provide follow-up calls to resolve consumers' service inquiries. For example, if a consumer inquiry requires account research, a customer service representative often completes the necessary research and places an autodialed follow-up call to the consumer. Autodialed calls are initiated also to remind consumers that a credit card they have requested was mailed and must be activated.

SURVEY, JANUARY-JUNE 2015 (2015), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.pdf (Tables 1 & 2).